

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN AND JOANNA ROBERTS,

Plaintiffs,

vs.

INTERNAL REVENUE SERVICE,

Defendant.

CASE NO.

COMPLAINT

Plaintiffs, **JOHN & JOANNA ROBERTS** file this action under the Freedom of Information Act, 5 U.S.C. §552(a),(b), the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Open Government Act), the Administrative Procedure Act, 5 U.S.C. §702, §706, and 26 U.S.C. §6103(e), for equitable or declaratory relief seeking an order directing Defendant to disclose and release Defendant agency records previously requested by Plaintiffs from Defendant which Defendant has repeatedly refused to disclose to Plaintiffs and which Defendant improperly directed, through its agents and its employees, not to be released to Plaintiffs.

PARTIES

1. Plaintiffs are private citizens and tax payers residing in this District, the Middle District of Florida.
2. Plaintiffs filed a joint income tax return with Defendant for years 2000 and 2001.
3. Defendant, IRS, is an “agency” within the meaning of 5 U.S.C. §552(f) and the records Plaintiffs previously requested from Defendant are situated in this District.

JURISDICTION AND VENUE

4. The District Court of the United States in the district in which Plaintiff resides, or has his principal place of business, or in which agency records are located, or in the District of Columbia has jurisdiction to enjoin the agency from withholding agency records and to order the production of agency records improperly withheld from Plaintiffs under 5 U.S.C. §552(a)(4)(B).

5. This Court has both subject matter jurisdiction over this action to enjoin Defendant agency from improperly withholding the previously requested records and has personal jurisdiction over the parties pursuant to 5 U.S.C. §552(a)(4)(B). This Court also has jurisdiction over this action which raises questions of federal law relevant to 5 U.S.C. §552, the Open Government Act, the Administrative Procedure Act, 5 U.S.C. §702, §706, and 26 U.S.C. §6103(e) pursuant to 28 U.S.C. §1331.

6. Venue is proper in the Middle District of Florida in this action pursuant to U.S.C. §552(a)(4)(B).

7. Plaintiffs reside in this District. Defendants are employed in this District or maintain offices in this District. Defendant IRS has also filed a Notice of Deficiency against Plaintiffs in U.S. Tax Court Case No. 8043-13 based on facts allegedly arising in this District.

FACTUAL ALLEGATIONS

8. Plaintiffs allege and reallege paragraphs 1-7 as fully set forth herein.

9. Sometime in 2004, the IRS commenced an investigation into Plaintiff John Roberts for possible criminal conduct in connection with the filing of Plaintiff John Roberts' 2000 and 2001 tax returns.

10. Sometime in March of 2007, Ron Wise, a partner of MRW Consulting Group, a firm specializing in forensic accounting and tax controversy issues and a former Branch Chief of

the Criminal Investigation Branch at the Atlanta Service Center, learned that Defendant was investigating Plaintiff John Roberts for possible criminal conduct in connection with the filing of his 2000 and 2001 tax returns.

11. On May 22, 2007 the U.S. Attorney's Office for the Middle District of Florida filed an indictment against Plaintiff, John Roberts, in *United States v. John M. Roberts*, 8:07-cr-00181-SDM (M.D. Fla. May 22, 2007) (DE-1) alleging that Mr. Roberts prepared or caused to be prepared false or fraudulent joint personal income tax returns for years 2000 and 2001.

12. In June 2007, Ron Wise submitted a complaint to the Office of the Treasury Inspector General for Tax Administration on behalf of Plaintiffs based on the fact that Plaintiff, John Roberts' sister-in-law had previously dated an IRS Agent who informed Plaintiff, John Roberts, that Defendant was conducting a criminal investigation and suggested the Plaintiff, John Roberts, list one or more of his properties for sale with the Agent's real estate firm to raise capital.

13. Following a significant loss to their personal residence as a result of tropical storm activity during 2004 in the Tampa area, Plaintiffs retained Ron Wise to prepare amended tax returns for years 2002, 2003, and 2004 to reflect the appropriate casualty loss. The loss resulted in an income tax refund for 2004 totaling \$94,000 plus interest that was paid to Plaintiffs in late 2008 or 2009. The casualty loss further resulted in a net operating loss that was carried back and applied to the amended individual income tax returns for 2002 and 2003 for Plaintiffs.

13. In or around September of 2009, Ron Wise spoke with the IRS Taxpayer Advocate to inquire about pending refunds for 2002 and 2003 that had never been received by Plaintiffs and which amounted to \$43,000 and \$74,000 for 2002 and 2003, respectively.

14. Based on that conversation, Mr. Wise suspected that a new criminal investigation of Plaintiff, John Roberts, had been undertaken and the refunds for years 2002 and 2003 had been retained by the IRS.

15. On September 3, 2009, Ron Wise sent a written communication to Linda Osuna, Special Agent in Charge (SAC) of the IRS Criminal Investigation Division for the Tampa Field Office, (hereinafter "SAC Osuna") requesting an update regarding the status of the investigation into Plaintiff, John Roberts, for the years 2002 and 2003.

16. No response was ever provided by SAC Osuna regarding that request.

17. In October 2009, a subpoena was delivered to MRW Consulting Group in Plantation, Florida demanding the production of documents relative to the preparation of Plaintiffs amended tax returns for 2002 and 2003. Those documents were provided in accordance with the subpoena.

18. In June of 2010, Mr. Wise and John Roberts' attorney met with the U.S. Attorney's Office for the Middle District of Florida to request the dismissal of the pending prosecutions against Plaintiff, John Roberts.

19. On September 29, 2010, Honorable District Judge Steven D. Merryday issued an Order granting the U.S. Attorney's Office for the Middle District of Florida Motion to dismiss the indictment in *United States v. John M. Roberts* with prejudice. (DE-29).

20. On October 1, 2010, Mr. Wise requested that SAC Osuna remove the account controls on Plaintiffs' 2002 and 2003 tax accounts that had resulted in the IRS retaining their requested tax refunds.

21. During that conversation, SAC Osuna stated she had approved the removal of the account controls two days earlier.

22. On November 16, 2010, after Ron Wise learned that the account controls had not been released on the 2002 and 2003 returns, Ron Wise phoned SAC Osuna.

23. During that conversation, SAC Osuna stated the release of the account controls was being processed.

24. On February 4, 2011, after conferring with the IRS Taxpayer Advocate regarding the release of the Plaintiffs' 2002 and 2003 tax refunds, Mr. Wise was informed that Plaintiffs' amended 2002 and 2003 tax returns were still in the possession of the case agent, Special Agent Richard Goodwill (hereinafter "Agent Goodwill").

25. The Tax Payer Advocate stated that those returns could not be processed until they were released by Agent Goodwill.

26. The Taxpayer Advocate further stated she had unsuccessfully attempted to contact both Agent Goodwill and SAC Osuna.

27. On February 8, 2011, Mr. Wise conferred with the IRS Taxpayer Advocate who stated she had received the Plaintiffs' amended 2002 and 2003 amended tax returns.

28. During that conversation, she said the returns could not be posted and the refunds could not be issued because the account controls had not been released by Agent Goodwill.

29. During that conversation, the Taxpayer Advocate further stated that she had been informed by SAC Osuna that the release of the account controls had been approved, but not completed.

30. Plaintiffs' 2002 and 2003 tax refunds were released May 2, 2011 and applied to tax liabilities for subsequent years.

31. In 2010, Plaintiffs filed an amended individual income tax return for 2006 claiming the remaining portion of the net operating loss resulting from the casualty loss occurring in 2004.

32. At that time, Plaintiffs were not aware that their prior accountant had incorrectly failed to carry part of the NOL back to 2001.

33. When a taxpayer fails to properly carry back a net operating loss, Defendant provides notification of the error and allows the taxpayer Sixty (60) days to correctly file the amended tax return.

34. A notification that there was an error relating to carrying back the net operating loss for Plaintiffs' 2001 joint income tax return was not provided in this instance within Sixty days of Plaintiffs' filing of the amended tax return for 2006.

35. Defendant's account controls prevented the posting of the 2002, 2003, and 2006 returns until 2011.

36. Defendant was directly responsible for causing that Sixty day period to expire by failing to properly provide notification to Plaintiffs

37. Defendant was unwilling to permit Plaintiffs to carry back the loss for Plaintiffs' 2001 joint income tax return.

38. The issue regarding the 2006 amended tax return is currently being resolved by the IRS Appeals Office in Miami, Florida.

39. During the spring of 2011, Defendant began conducting audits of Plaintiffs' individual and corporate tax returns for 2008 and 2009. During that process, the IRS Agent informed Ron Wise that an audit of Plaintiffs' 2000 and 2001 individual income tax returns would be undertaken.

40. The 2009 audit was resolved with no recommendations for changes to the Plaintiffs' corporate or individual income tax returns.

41. The primary issue relative to the 2008 audit was additional deductions for casualty losses identified during that year.

42. During numerous written and oral communications between Mr. Wise and Defendant regarding the 2008 audit, IRS Agent Lisa Kelly (hereinafter "Agent Kelly") failed to address or respond to information presented by Plaintiffs including relevant court cases, IRS guidelines and Treasury Regulations.

43. During the final conference between Mr. Wise and Defendant regarding this tax year, IRS Supervisor Daniel Itchue stated he did not intend to review Defendant's recommendations in detail as he considered it "an exercise in futility."

44. Mr. Itchue further suggested that Plaintiffs request that the case be transferred to the IRS Appeals office instead of trying to resolve it at the field office level.

45. Defendant's Appeals Office in Miami, Florida is currently reviewing Plaintiffs 2008 tax returns.

46. On June 1, 2011 Agent Kelly sent a letter to Ron Wise regarding proposed Income Tax Audit changes to Plaintiffs 2000 and 2001 income tax returns.

47. Following the receipt of that letter, Ron Wise engaged in email correspondence and numerous phone conversations with Agent Kelly.

48. During one conversation, Agent Kelly stated that Plaintiffs had been provided sufficient opportunity during the original examination to provide documentation supporting their position.

49. Agent Kelly further stated that she did not intend to consider additional information.

50. In response to Agent Kelly's assertion, Mr. Wise explained to Agent Kelly that when Plaintiff, John Roberts, was the subject of a criminal investigation, he was entitled to the full protections of the Fifth Amendment of the U.S. Constitution including the right against self-incrimination.

51. During another conversation with Agent Kelly, she communicated to Ron Wise that the investigation conducted by the IRS Special Agent was sufficient.

52. Agent Kelly also told Ron Wise that she did not intend to re-examine Plaintiffs' 2000 and 2001 tax returns.

53. Agent Kelly further stated that U.S. Attorney's Office dismissed the indictment in the original criminal case because of "due process" issues.

54. Agent Kelly further stated to Ron Wise that the case should "be in court."

55. Agent Kelly further stated that, in conducting the civil investigation, she intended to rely on the findings and recommendations of the Special Agent who conducted the original criminal investigation.

56. On July 1, 2011, Ron E. Wise mailed a FOIA request to Defendant requesting that Defendant release numerous documents related to Plaintiff's "return information" as defined by 26 U.S.C. §6103(b)(2).

57. Mr. Wise requested the return information from Defendant because Defendant's failure to provide such return information has significantly prejudiced Plaintiffs. Plaintiffs are significantly prejudiced without access to the requested records.

58. Mr. Wise requested the return information from Defendant to demonstrate that Defendant had severely abused its discretion in initiating a criminal prosecution against Plaintiffs.

59. The requested documents were as follows:

- Forms 3949
- Forms 5043
- Forms 4930
- Forms 6082
- Forms 6083
- Forms 6084
- Forms 6085
- Special Agents' Time/Activity Reports
- Special Agents' Diaries
- Notes, Transmittals, and Correspondence to and/or from case reviewers and related responses
- Notes, Transmittals, and Correspondence to and/or from CT Counsel and related responses
- Notes, Transmittals, and Correspondence to and/or from Department of Justice, Tax Division and related responses
- Notes, Transmittals, and Correspondence to and/or from the Office of the U. S. Attorney and related responses
- Special Agent's Report recommending prosecution including all appendices
- Special Agents' Report recommending discontinuing of investigation; Form 10273, Discontinued Investigation Report
- Affidavits, Memoranda of Interview, Question and Answer Statements, Transcripts of Interviews with all witnesses, whether included as exhibits with Special Agent's Report or retained in the Special Agent's files

- Affidavits, Memoranda of Interview, Question and Answer Statements, and Transcripts of Interviews with John and/or Joanna Roberts, whether included as exhibits with Special Agent's Report or retained in the Special Agent's files

60. In August 2011, Mr. Wise received a letter from Defendant and attached Income Tax Discrepancy Adjustments ("Report").

61. This Report was supported by narrative excerpts and schedules from Defendant's original Criminal Investigation prosecution recommendation.

62. On September 12, 2011, Defendant responded to Plaintiff's FOIA request stating that several of the requested documents do not exist and that the remaining requested documents are exempt from disclosure pursuant to various FOIA exemptions, including 5 U.S.C. §552(b)(7)(A), (b)(3) and 26 U.S.C. §6103 (b)(2),(e)(7), and (E).¹

63. During the following weeks, Mr. Wise requested supporting documentation from Agent Lisa Kelly relative to the narrative excerpts and schedules that were attached to her Report from August of 2011.

64. On September 15, 2011, Agent Kelly stated that Agent Goodwill had advised her not to provide Mr. Wise with any of the supporting documentation he had requested.

65. During that same conversation, Mr. Wise asked Agent Kelly how Plaintiffs could make a decision regarding the validity of her findings without understanding the underlying documents.

66. Agent Kelly responded that this was an issue that could not be settled at the Audit stage, and it needed to be addressed at the IRS Appeals level or in Tax Court.

¹ Notably several of the provisions cited by Defendant to claim exemptions under Section 6103 are inapplicable or do not provide any legal ground for claiming an exemption.

67. On October 17, 2011, Mr. Wise submitted a letter to Defendant on behalf of Plaintiffs requesting that the 2000 and 2001 audit be transferred to the Appeals office.

68. On January 12, 2012, Mr. Wise provided a letter and attachments addressed to the IRS Appeals Office in Miami Florida wherein Mr. Wise challenged the recommendations in the Tax Audit in connection with Plaintiffs' 2000 and 2001 tax returns.

69. The Tax Audit was ultimately returned to the Examination Division for completion by the IRS Appeals office.

70. In late August or September of 2012, Plaintiff, John Roberts, received notification that a summons had been issued to the Tampa Postal Federal Credit Union requesting the account records of Damon Zarzeski.²

71. On August 21, 2012, Agent Lisa Kelly stated to Mr. Wise that she had re-issued the subject summons for Mr. Zarzeski in order to "perfect it."

72. In January of 2013, Mr. Wise received a Notice of Deficiency from Defendant and attachments regarding Plaintiffs' 2000 and 2001 tax returns.

73. Defendant's findings in the Notice of Deficiency were identical to the previous findings made in the original criminal case initiated by Defendant.

74. The findings in the Notice were based entirely on the original IRS Special Agent's prosecution report even though the original IRS Special Agent's report and supporting schedules were not included or referenced in the Notice.

75. The original IRS Special Agent's report and supporting schedules were instead repeated in IRS Examination forms.

² Mr. Zarzeksi was a subject of the IRS' criminal investigation beginning in 2004 in connection with the filing of Plaintiffs 2000 and 2001 tax returns.

76. Defendant failed to include the original Special Agent Report to conceal Defendant's motivations for initiating the Notice of Deficiency action against Defendants.

77. Defendant's initiated that action against Plaintiffs to prosecute Plaintiff John Roberts

78. Defendant's initiated that action against Plaintiffs to retaliate against Plaintiff John Roberts for obtaining a dismissal of the indictment in the aforementioned criminal proceedings

79. Defendant included Joanna Roberts in that action to further punish and/or retaliate against John Roberts for obtaining a dismissal of the indictment in the aforementioned criminal proceedings.

80. On March 6, 2013, Plaintiffs renewed their FOIA request and requested additional records from Defendant.

81. Plaintiffs requested records in the renewed FOIA because Defendant's failure to produce such records had already substantially prejudiced Plaintiffs

82. The records requested from Defendant in the renewed Request were as follows:

- Forms 4930
- Forms 6083
- Special Agents' Time/Activity Reports
- Special Agents' Diaries
- Notes, Transmittals, and Correspondence to and/or from case reviewers and related responses
- Notes, Transmittals, and Correspondence to and/or from CT Counsel and related responses
- Notes, Transmittals, and Correspondence to and/or from Department of Justice, Tax Division and related responses

- Notes, Transmittals, and Correspondence to and/or from the Office of the U. S. Attorney and related responses
- Special Agent's Report recommending prosecution including all appendices
- Special Agents' Report recommending discontinuing of investigation; Form 10273, Discontinued Investigation Report
- Affidavits, Memoranda of Interview, Question and Answer Statements, Transcripts of Interviews with all witnesses, whether included as exhibits with Special Agent's Report or retained in the Special Agent's files
- Affidavits, Memoranda of Interview, Question and Answer Statements, and Transcripts of Interviews with John and/or Joanna Roberts, whether included as exhibits with Special Agent's Report or retained in the Special Agent's files

83. On April 8, 2013, Defendant's Disclosure Manager for Disclosure Office 13, Klaudia Villegas, authored a denial of Plaintiffs Renewed FOIA Request.

84. In her denial, Defendant reiterated FOIA exemptions 5 U.S.C. § 552(b)(5), 7(A), (b)(7)(E), and IRC exemption 26 U.S.C. §6103 (e)(7) to support the denial.

85. In the denial, Defendant provided no analysis whatsoever of how each claimed exemption under FOIA or 26 U.S.C. §6103 would apply to each requested document.

86. On May 6, 2013, Plaintiffs submitted an Appeal of Defendant's denials of Plaintiffs FOIA Request and Renewed FOIA Request.

87. The Appeal stated that Defendant had failed to adequately search for the requested documents.

88. The Appeal further stated that Defendant's responses denying the two previous FOIA Requests amounted to "conclusory say so" and failed to provide any analysis demonstrating how specific FOIA exemptions claimed by Defendant apply to each requested document.

89. The Appeal further stated that Defendant failed to “reasonably segregate” any non-exempt information in the requested documents from any exempt information in the requested documents.

90. On May 22, 2013, Defendant denied Plaintiffs Appeal.

91. In the denial of Plaintiffs Appeal, Defendant again regurgitated the claimed FOIA exemptions under 5 U.S.C. § 552(b)(5), (b)(7)(A), and cited 26 U.S.C. §6103 (e)(7) and (b)(3) as exemptions.

92. 26 U.S.C. §6103(b)(3) is not an exemption to FOIA or the production of requested agency records.

93. In denying Plaintiffs Appeal, Mr. P. Perez, Defendant Appeals Manager, stated that in forming his opinion, he had reviewed “Disclosure Specialist [Klaudia Villegas] notes and the response from the function in control of the responsive records..”

94. On June 6, 2013, undersigned counsel spoke with Corrina Zarek, counsel for the Office of Governmental Information Services National Archives and Records Administration (OGIC) in Washington, DC regarding the denial of the Appeal.

95. During that conversation, undersigned counsel asked Ms. Zarek whether Plaintiffs had “exhausted” their administrative remedies and could initiate a FOIA Complaint without first engaging in mediation with OGIC.

96. Ms. Zarek confirmed that Plaintiffs had exhausted their administrative remedies and may file a FOIA action without first participating in mediation.

97. To date, Defendant has not produced one document or record in response to Plaintiffs FOIA requests. It is simply unimaginable that Defendant cannot identify and produce one document or record that is responsive to Plaintiffs’ request.

CAUSES OF ACTION AGAINST DEFENDANT

Count One

**Production of Agency Records Improperly Withheld by Defendant
(5 U.S.C. § 552)**

98. Plaintiffs allege and reallege paragraphs 1-97 above as if fully set forth herein.

99. 5 U.S.C. § 552(a)(3)(A) requires that Defendant, an “agency” under 5 U.S.C. § 552(f) promptly disclose records requested by “any person.”

100. “Return information with respect to any taxpayer may be open to inspection or disclosure to any person authorized by this subsection,” as long as “disclosure would not seriously impair Federal tax administration.” *See* 26 U.S.C. § 6103(e)(7)

101. Plaintiffs previously requested agency records from Defendant, *i.e.* “return information” as defined by 26 U.S.C. §6103(b)(2), in a FOIA Request dated July 1, 2011.

102. Plaintiffs previously requested agency records from Defendant, *i.e.* “return information” as defined by 26 U.S.C. §6103(b)(2), in a FOIA Request dated March 6, 2013.

103. Plaintiffs previously requested agency records from Defendant, *i.e.* “return information” as defined by 26 U.S.C. §6103(b)(2), in in Plaintiffs’ Appeal dated May 6, 2013.

104. Defendant has maintained exclusive possession, control, or custody of the previously requested agency records or “return information” since at least 2006.

105. Defendant continues to violate 5 U.S.C. §552(a)(3)(A) and continues to improperly withhold the previously requested agency records by claiming that the records are exempt under 5 U.S.C. § 552(b)(5), 7(A), and (b)(7)(E).

106. Defendant has not provided any analysis – other than legal conclusions or recitals of FOIA provisions -- or articulated any facts to establish that the aforementioned FOIA exemptions apply to records Plaintiffs previously requested.

107. Defendant has repeatedly rejected FOIA requests submitted by Plaintiffs' return information without providing a single fact demonstrating why or how disclosure would seriously impair Federal tax administration.

108. Based on these facts, Defendant has acted in direct contravention of 5 U.S.C. § 552(a) and 26 U.S.C. § 6103(e)(7).

109. Based on these facts, Plaintiffs seek an order directing Defendant to produce the previously requested agency records, "return information" as defined by 26 U.S.C. § 6103(b)(2), in accordance with Plaintiffs' previous FOIA Requests dated July 1, 2011 and March 6, 2013, and Plaintiffs Appeal of the denial of both FOIA Requests, agency records which Defendant has improperly withheld and continues to improperly withhold under 26 U.S.C. § 6103(e)(7).

110. Based on these facts, Plaintiffs further seek an order of the Court compelling compliance and directing and ordering Defendant to provide and produce the agency records improperly withheld from Plaintiffs under 5 U.S.C. § 552(b)(5), 7(A), and (b)(7)(E), and any and all documents, records, and information whatsoever pertinent to the aforementioned FOIA Requests and the aforementioned Appeal.

111. Furthermore, Agent Kelly, Agent Goodwill, SAC Osuna, and Ms. Villegas should be ordered to appear before this Honorable Court and provide examinations under oath explaining the relevance of the documents the IRS has continued to refuse to turn over or has directed not to be released to Plaintiffs.

Count Two
Inadequate Search for Previously Requested Records
(5 U.S.C. § 552(a))

112. Plaintiffs allege and reallege paragraphs 1-111 above as if fully set forth herein.

113. FOIA requires that an agency conduct a reasonable and adequate search for the records requested by Plaintiffs. *See* 5 U.S.C. §552(a)(3)(B)-(C).

114. Defendants failed to produce a single document in response to Plaintiffs FOIA request dated July 1, 2011.

115. In denying Plaintiffs' July 1, 2011, FOIA request, Defendant failed to articulate or identify facts illustrating that Defendant conducted a reasonable or adequate search in accordance with 5 U.S.C. §552(a)(3)(B)-(C) to locate the documents previously requested by Plaintiffs.

116. Defendants failed to produce a single document in response to Plaintiffs renewed FOIA request dated March 6, 2013.

117. In denying Plaintiffs' renewed March 6, 2013, FOIA request, Defendant failed to articulate or identify facts illustrating that Defendant conducted a reasonable or adequate search in accordance with 5 U.S.C. §552(a)(3)(B)-(C) to locate the documents previously requested by Plaintiffs.

118. Defendant failed to produce a single document in response to Plaintiffs Appeal of Defendant's denials of the previous FOIA requests dated May 6, 2013.

119. In denying Plaintiffs Appeal, Defendant failed to articulate or identify facts illustrating that Defendant conducted a reasonable or adequate search in accordance with 5 U.S.C. §552(a)(3)(B)-(C) to locate the documents previously requested by Plaintiffs.

120. For these reasons and based on Defendant's repeated failure to produce a single record in response to the previous FOIA requests and the Appeal, Plaintiffs seek an order directing Defendant to comply with 5 U.S.C. §552(a)(3) and to conduct a good faith search for the requested records using methods which can be reasonably expected to produce the

information previously requested by Plaintiffs in FOIA Requests submitted by Plaintiffs and the Appeal, dated May 6, 2013 and any other pertinent information whatsoever relevant to Plaintiffs prior FOIA submissions to Defendant.

Count Three
Violation of Reasonable Segregation Requirements
(5 U.S.C. § 552(b))

121. Plaintiffs allege and reallege paragraphs 1-120 above as if fully set forth herein.

123. 5 U.S.C. §522(b) requires that Defendant undertake specific reasonable segregations requirements in producing agency records.

124. Federal agencies conducting reasonable segregation are also required to provide the amount of information deleted, and indicate the exemption under which the deletion is made on the released portion of the requested record. *See* 5 U.S.C. § 552(b).

125. Defendants failed to produce a single document in response to Plaintiffs FOIA request dated July 1, 2011.

126. In denying Plaintiffs' July 1, 2011 FOIA request, Defendant failed to reasonably segregate any exempt information from non-exempt information.

127. In denying Plaintiffs' July 1, 2011 FOIA request, Defendant also failed to provide the amount of information deleted, and indicate the exemption under which the deletion is made on the released portion of the requested record.

128. Defendants failed to produce a single document in response to Plaintiffs renewed FOIA request dated March 6, 2013.

129. In denying Plaintiffs' renewed March 6, 2013 FOIA request, Defendant Plaintiffs, Defendant failed to reasonably segregate any exempt information from non-exempt information.

130. In denying Plaintiffs' renewed March 6, 2013 FOIA request, Defendant also failed to provide the amount of information deleted, and indicate the exemption under which the deletion is made on the released portion of the requested record.

131. Defendant failed to produce a single document in response to Plaintiffs Appeal of Defendant's denials of the previous FOIA requests dated May 6, 2013.

132. In denying Plaintiffs Appeal, Defendant Plaintiffs, Defendant failed to reasonably segregate any exempt information from non-exempt information.

133. In denying Plaintiffs' Appeal, Defendant also failed to provide the amount of information deleted, and indicate the exemption under which the deletion is made on the released portion of the requested record.

134. For these reasons, Defendant failed to comply with any of the statutory requirements in 5 U.S.C. § 552 governing segregation.

135. For these reasons, Defendant also failed to produce any "reasonably segregable portion" of the records requested by Plaintiffs in accordance with Plaintiffs' previous FOIA Requests and Plaintiffs' Appeal dated May 6, 2013.

136. Based on these failures, Plaintiffs seek an order directing Defendant to produce and disclose all of the records requested by Plaintiffs pursuant to the previous FOIA Requests and the Appeal dated May 6, 2013, and any other pertinent information whatsoever relevant to those requests in accordance with all applicable reasonable segregation requirements under 5 U.S.C. § 552.

Count Four
Arbitrary and Capricious Agency Action or Agency Finding
Administrative Procedure Act
(5 U.S.C. § 702, 706)

137. Plaintiffs allege and reallege paragraphs 1-136 as if fully set forth herein.

138. 5 U.S.C. § 702 of the Administrative Procedure Act which provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

139. This court has jurisdiction to review Defendant's denial of Plaintiff's previous FOIA Requests and Appeal pursuant to 5 U.S.C. §702.

140. Under 5 U.S.C. § 706 of the Administrative Procedure Act, a reviewing court is required to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

141. Furthermore, under 5 U.S.C. §706, a reviewing court shall compel agency action unlawfully withheld or unreasonably delayed and shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or contrary to constitutional right, power, privilege, or immunity.

142. Defendant dismissed all criminal charges against Plaintiff, John Roberts, in connection with the filing of his personal income tax returns for years 2000 and 2001 in *United States v. John M. Roberts*.

143. To date, Defendant has denied two FOIA requests and Plaintiff's Appeal of Defendant's denial of those previous FOIA requests.

144. To date, Defendant has not produced a single record in response to Plaintiffs' previous FOIA requests or Plaintiff's Appeal of Defendant's denial of those FOIA requests.

145. To support those denials, Defendant has invoked the exemptions under U.S.C. §552 and 26 U.S.C. §6103.

146. Defendant has initiated a Notice of Deficiency action against Plaintiff.

147. Defendant asserts in the Notice of Deficiency action that the fraud penalty, 26 U.S.C. § 6663, applies to Plaintiffs' conduct dating back to 2000 and 2001.

148. Civil fraud penalties will be asserted when there is clear and convincing evidence to prove that some part of the underpayment of tax was due to fraud. Such evidence must show the taxpayer's intent to evade the assessment of tax which the taxpayer believed to be owing. Intent is distinguished from inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence or carelessness. *See IRS Manual, Civil Fraud, 25.1.6.1.*

149. In the case of a joint return, intent must be established for each spouse separately as required by IRC § 6663(c). The fraud of one spouse cannot be used to impute fraud by the other spouse. Thus, the civil fraud penalty may be asserted on one spouse only. *See IRS Manual, Civil Fraud, 25.1.6.1.*

150. Under 26 U.S.C. § 6663, unlike federal criminal tax statutes, the fraud penalty has no statute of limitations.

151. Defendant, through its agents and employees, has engaged in an agency action which is arbitrary and capricious by repeatedly denying Plaintiffs FOIA Requests and Appeal,

152. Defendant has employed an arbitrary and capricious interpretation of the exemptions under 5 U.S.C. §552 and 26 U.S.C. §6103 to support Defendant's repeated denials of Plaintiffs FOIA Requests and Appeal.

153. Defendant has interpreted the exemptions under 5 U.S.C. §552 and 26 U.S.C. §6103, arbitrarily and capriciously in order to withhold the previously requested agency records from Plaintiffs.

154. Defendant has interpreted the exemptions under 5 U.S.C. §552 and 26 U.S.C. §6103 arbitrarily and capriciously to conceal the fact that Defendant's ongoing Notice of Deficiency action against Plaintiffs is a reprosecution and reindictment of Plaintiffs for allegations that Defendant previously agreed to dismiss against Plaintiff, John Roberts, in *United States v. John M. Roberts*.

155. Defendant has interpreted the exemptions under 5 U.S.C. §552 and 26 U.S.C. §6103 arbitrarily and capriciously to initiate a retaliatory action against Plaintiffs using one of the few federal statutes that has an indefinite statute of limitations, 26 U.S.C. § 6663, in order to reprosecute Plaintiffs for the conduct the government agreed to dismiss against Plaintiff, John Roberts

156. Defendant's arbitrary and capricious agency action has substantially prejudiced Plaintiffs.

157. Defendant's arbitrary and capricious interpretation of the exemptions under 5 U.S.C. §552 and 26 U.S.C. §6103 has substantially prejudiced Plaintiffs.

REQUEST FOR ATTORNEY'S FEES AND COSTS
(§552 U.S.C. (a)(4)(E)(i)-(ii))

158 Plaintiffs allege and reallege paragraphs 1- 157 above as if fully set forth herein.

159. Attorney's fees are proper when a Plaintiff substantially prevails pursuant to §552 U.S.C. (a)(4)(E)(i)-(ii).

160. Plaintiff requests that all costs, fees, and expenses including all attorneys be assessed against Defendant.

REQUEST FOR ADDITIONAL FINDINGS
(5 U.S.C. §552(a)(4)(F))

161. Plaintiffs allege and reallege paragraphs 1- 160 above as if fully set forth herein.

162. Pursuant to 5 U.S.C. §552(a)(4)(F),³ Plaintiffs request that this Court enter a written order that the circumstances surrounding Defendant's withholding of the previously requested agency records raise questions about whether Defendant, through its agents and employees, including but not limited to, Agent Kelly, Agent Goodwill, SAC Osuna, and Ms. Villegas, acted arbitrarily, capriciously, or in bad-faith in withholding the records previously requested by Plaintiffs.

163. Pursuant to 5 U.S.C. §552(a)(4)(F),⁴ Plaintiffs further request that this Court appoint Special Counsel to promptly initiate a proceeding to determine whether disciplinary actions against the aforementioned individuals are appropriate in this case based on their primary responsibility for withholding or continuing to withhold the records repeatedly and previously requested by Plaintiffs.

³ This provision of the FOIA statute was amended pursuant to OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524

⁴ This provision of the FOIA statute was amended pursuant to OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524

REQUEST TO EXPEDITE PROCEEDINGS
(5 U.S.C. §522(a)(4)(C))

164. Plaintiffs allege and reallege paragraphs 1-163 as if fully set forth herein.

165. Plaintiff requests that this Court shorten the statutorily allotted time period of Thirty (30) days for Defendant to respond. The time period should be shortened to Fifteen (15) days which is authorized under 5 U.S.C. § 522(a)(4)(C) when good cause is shown.

166. There is good cause to shorten the authorized time period in this case because Defendant, through its agents and employees, has continued a course of conduct spanning almost a decade with the purpose and objective of prosecuting and punishing Plaintiff, John Roberts for alleged frauds that Plaintiff, John Roberts, has never committed.

167. Defendant has not adequately searched for, identified, reasonably segregated, or produced one document, which is responsive to Plaintiffs requests dated July 1, 2011 and March 6, 2013, respectively, and the Appeal submitted by Plaintiffs on May 6, 2013.

168. Defendant's failure to comply with these statutory requirements is evidence of a concerted effort to retaliate against Plaintiff for prevailing in the previous criminal proceedings.

169. Defendant's failure to comply with these statutory requirements compellingly illustrates the lengths which Defendant will go to avoid producing records which are patently prejudicial to Defendant in the ongoing Notice of Deficiency action.

170. Defendant has added Joanna Roberts, as a co-defendant in the Notice of Deficiency Action to further retaliate against Plaintiff, John Roberts, for prevailing in the previous criminal proceedings.

171. Standing alone or in combination, these facts show that there is a good cause to order a shorten time period within which the Defendant has to respond to this Complaint.

WHEREFORE, Plaintiffs respectfully request and pray that this Honorable Court issues an order directing that:

(i) Defendant conduct an adequate and reasonable search to identify and locate all previously requested records,

(ii) Defendant immediately produce the requested records in accordance with all previous FOIA Requests and the Appeal submitted by Plaintiffs,

(iii) Defendant comply with all requirements of reasonable segregation pursuant to 5 U.S.C. §522 and the Open Government Act of 2007,

(iv) Defendant pay all attorney's fees and cost incurred in connection with all previous FOIA Requests, Plaintiffs Appeal, and this action pursuant to §552 U.S.C. (a)(4)(E)(i)-(ii).

(v) Agent Kelly, Agent Goodwill, SAC Osuna, Ms. Villegas, and any other relevant members of Defendant agency, including but not limited to the Special Agents involved in the investigation and prosecution of Plaintiff, John Roberts, provide testimony under oath before this Honorable Court explaining the reasons underlying Defendant's continuing refusal to release the documents previously requested by Plaintiffs and how a release would seriously impair Defendant's ability to enforce and administer the Federal tax laws,

(vi) Any additional relief that this Court finds just and equitable under the facts and circumstances in this case,

(vii) Defendant's withholding of the records requested constitutes an arbitrary and capricious agency action or finding which shall be held unlawful under the Administrative Procedure Act, 5 U.S.C. §702, 706, and

(viii) Defendant's withholding of the previously requested agency records raises questions about whether Defendant, through its agents and employees, including but not limited

to, Agent Kelly, Agent Goodwill, SAC Osuna, and Ms. Villegas, acted arbitrarily, capriciously, or in bad-faith in withholding the records previously requested by Plaintiffs pursuant to §552(a)(4)(F).

Respectfully submitted,

ROETZEL & ANDRESS, LPA

/s/ Brian E. Dickerson

Brian E. Dickerson (0106615)

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby CERTIFY that on June 28, 2013, I electronically filed the foregoing with the Clerk of the Court using the CMS/ECF system, which will send notice of electronic filing to all registered users.

/s/ Brian E. Dickerson

Brian E. Dickerson (0106615)